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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/589,499

06/07/2000

Douglas R. Mongcon

2326/29

8507

26646

7590

10/02/2006

KENYON & KENYON LLP  
ONE BROADWAY  
NEW YORK, NY 10004

EXAMINER

DAWSON, GLENN K

ART UNIT

PAPER NUMBER

3731

DATE MAILED: 10/02/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/589,499

Applicant(s)

MONGEON, DOUGLAS R.

Examiner

Glenn K. Dawson

Art Unit

3731

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 July 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 21,22,24-30 and 32-43 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 21,22,24-28,30,33 and 35-43 is/are rejected.
- 7) ☒ Claim(s) 29,32 and 34 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 21,22,24-28,30,33 and 35-43 are rejected under 35 U.S.C. 102(e) as being anticipated by Brain-6705318.

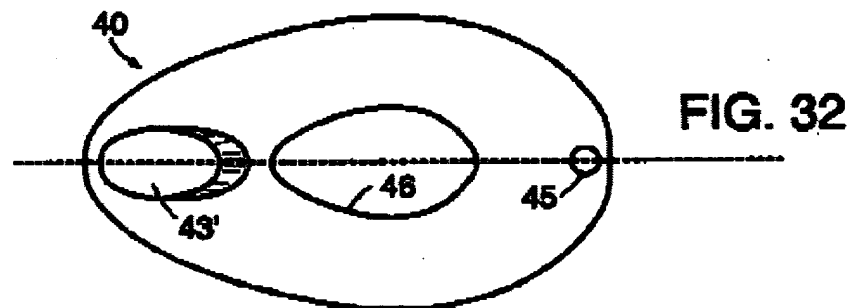
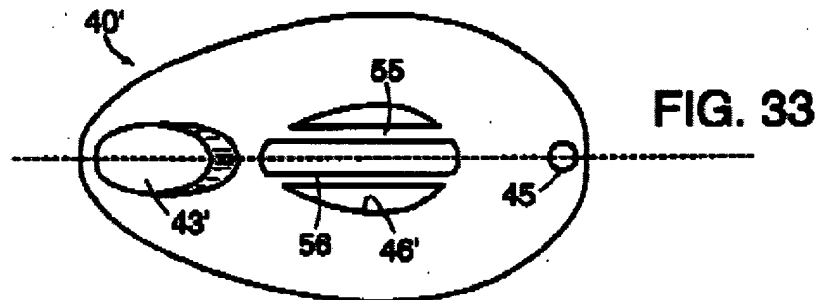
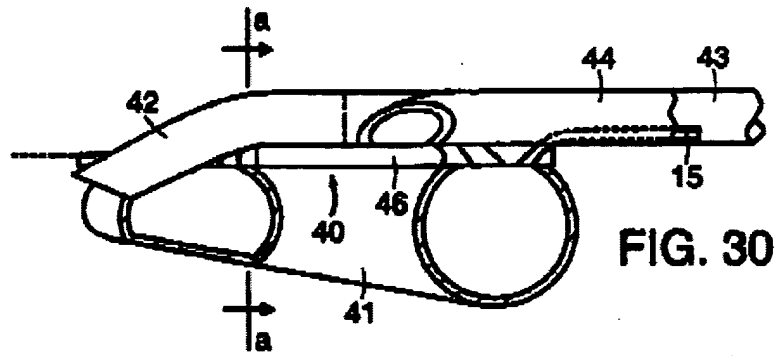
Brain discloses in fig. 33 an airway tube 43 having a distal portion and a proximal portion. The distal portion includes a mask-opening portion including an enlarged proximal portion and a tapered distal portion. Walls of the distal portion are separated by an opening 46 having parallel bars 55 spanning the opening forming a grate. The bars would act as applicant's and could prevent anatomical portions from entering the opening, if anatomical portions were placed adjacent the opening. See the figure below. See fig. 15 an accompanying description for the claimed method steps.

**U.S. Patent**

Mar. 16, 2004

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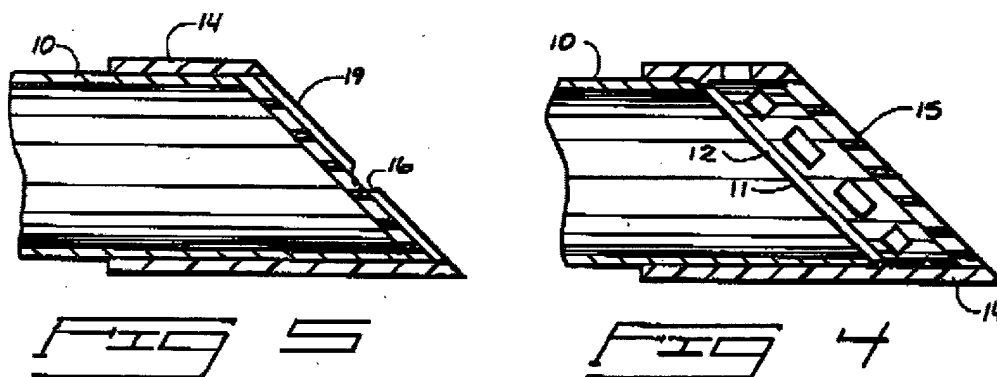
**US 6,705,318 B1**



Claims 21,22,24-26,28,30,33,35-37 and 41-43 are rejected under 35

U.S.C. 102(b) as being anticipated by McVey-4265621.

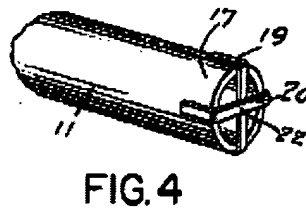
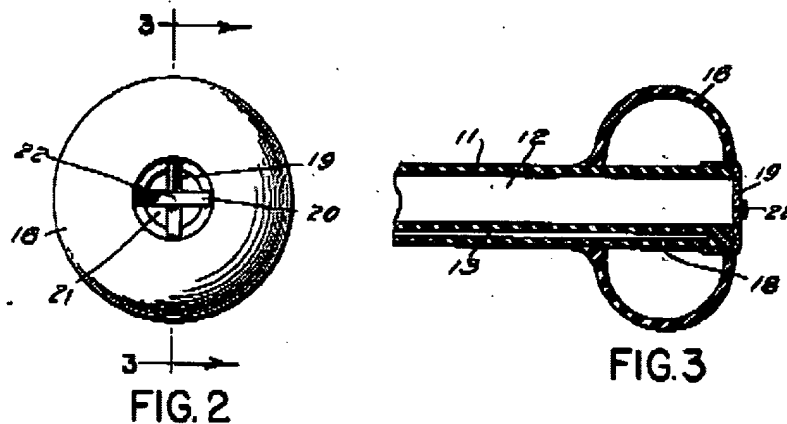
McVey discloses an airway tube (a tube which can convey air) including a tubular member having proximal and distal end portions. The distal end portion includes a mask-opening portion having an enlarged proximal portion 14 tapering to a smaller distal portion. Walls of the distal portion are separated by an inclined opening covered by an inclined grate 15. The grate bars would act to prevent any anatomical portions from entering the opening, if anatomical portions were placed adjacent the opening. There is nothing preventing the device from being placed in the pharynx.



Claims 21,22,24-26,28 and 41-43 are rejected under 35 U.S.C. 102(b) as being anticipated by Raiche-2677375.

Raiche discloses an airway tube having proximal and distal portions. The distal portion is characterized by a mask-opening portion having a proximal enlarged portion – proximal portion of balloon cuff 16 tapering to a smaller distal end. The walls at the distal end are separated by an opening covered by a grate 20,22. The bars of the grate would act to prevent anatomical portions from entering the opening, if anatomical

portions were placed adjacent the opening. The previous notations on the below figures should be understood as being duplicated herein. There is nothing preventing this device from being used as an oral airway.



#### ***Allowable Subject Matter***

Claims 29,32 and 34 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### ***Interference***

An interference cannot be initiated at this time as the claims are not patentable to the applicant for the above reasons.

### ***Response to Arguments***

Applicant's arguments filed 07-03-2006 have been fully considered but they are not persuasive.

The applicant argues that the grates covering the openings of the prior art devices do not meet the new limitation that they restrain any anatomical portions of the patient from entering the opening. This limitation is entirely functional in nature. It does not connote any particular or specific structure. The grates of the prior art, if placed in the claimed regions would act the same as the applicant's device. In fact virtually any grate covering an opening would perform the same function, if anatomical portions were placed adjacent the opening.

The fact that the prior art grate bars are designed for other purposes does not prevent them from also acting in the claimed manner.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Glenn K. Dawson whose telephone number is 571-272-4694. The examiner can normally be reached on M-Th 7:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anhtuan T. Nguyen can be reached on 571-272-4963. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Glenn K Dawson  
Primary Examiner  
Art Unit 3731

Gkd  
20 September 2006



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